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No. 79-2021

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL WILLIAM STRAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the trial judge properly instructed the jury regarding the proof necessary to establish the existence of a securities fraud scheme.

2. Whether the trial judge erred in treating the issue of materiality under the statute proscribing the filing of a false income tax return as a question of law for the court.

3. Whether the government's inadvertent failure to disclose a statement of the petitioner prior to trial constituted reversible error where the statement was not used at trial.

4. Whether the prosecutor's closing argument was improper.

5. Whether the trial judge erred in failing to dismiss the securities fraud charge for pre-indictment delay.

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OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. 23-39) is reported at 617 F. 2d 571.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1980. An extension of time was granted for the filing of the petition for a writ of certiorari until June 21, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of 26 U.S.C. 7206(1) and 15 U.S.C. 77q(a) are set forth at Pet. 3-4.

STATEMENT

After a jury trial in the United States District Court for the District of Utah, petitioner was convicted for submitting a false income tax return for 1973, in violation of 26 U.S.C. 7206(1) (Count I), and for fraud in the sale of securities, in violation of 15 U.S.C. 77q(a) (Count II). The district court sentenced him to three years' imprisonment on Count I and five years' imprisonment on Count II, with all but six months of the sentence suspended, to be followed by five years' probation (Pet. App. 25). The court of appeals affirmed (Pet. App. 23-39).

The evidence adduced at trial showed that petitioner frequently bought and sold the stock of Epoch Corporation, a security traded in the over-the-counter market. Petitioner effectuated these transactions through his own accounts and through various nominee accounts at different brokerage houses. In this way, petitioner was able to control the purchase and sale prices of the Epoch

Corporation stock and to create the appearance of an active market for its securities. In addition to the stock transactions, petitioner was involved in preparations for two mergers in 1973 for which he received finder's fees in the total amount of $29,000. Petitioner failed to report either the gross receipts from the sales of Epoch stock or the finder's fees on his 1973 tax return (Pet. App. 24).

ARGUMENT

1. Petitioner argues (Pet. 8-11) that the trial judge imposed a lesser burden of proof on the government in demonstrating the securities fraud scheme than that imposed by another judge in a pretrial ruling. This, he contends, deprived him of his right to be informed of the nature of the accusations against him. Prior to trial, petitioner moved to dismiss Count II of the indictment on the ground that it was duplicitous in that it set forth three separate sales and, further, that it was insufficient to reveal the nature of the charge against him (Pet. App. 32). Government counsel responded that the indictment charged a crime with sufficient clarity to allow petitioner to prepare a defense and that the six subparagraphs of Count II were not duplicitous, but represented different aspects of a single scheme to defraud (Pet. App. 32-33). In denying petitioner's motion to dismiss, the district judge hearing the pretrial motion ruled that the government would have to prove all the allegations enumerated within the six subparagraphs of Count II of the indictment in order to prove the scheme to defraud (Pet. App. 33). Petitioner's case was later assigned to another district judge for trial. After all of the trial evidence was presented, but prior to the court's instructions to the jury, the trial judge ruled (Pet. App. 34) that a conviction under 15 U.S.C. 77q(a) required that the actions proved under Count II of the indictment constituted one or more

of three types of activities prohibited by Section 77q(a).[1] This ruling is squarely in accord with this Court's recent decision in *United States* v. *Naftalin*, 441 U.S. 768, 772-774 (1979).

Relying on the opinion of Judge McKay, concurring in part and dissenting in part (Pet. App. 38-39), petitioner contends (Pet. 9) that the trial judge's interpretation of 15 U.S.C. 77q(a) allowed the prosecutor to change his theory of the case with respect to the proof necessary to show the existence of a scheme to defraud purchasers. But the ruling by the trial judge related only to the sufficiency of the scheme alleged to show a violation of 15 U.S.C. 77q(a). In an instruction drawn from Devitt and Blackmar, the court informed the jury that the government was required to prove that petitioner participated in the precise scheme alleged in the indictment (Tr. 928). See 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 54.07 (3d ed. 1977). The trial judge's ruling thus did not alter the requirement imposed at the pretrial hearing that the government prove all the allegations in Count II of the indictment in order to establish the

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[1]Section 77q(a) provides that:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

scheme to defraud. Nor does petitioner contend that the government failed to meet this burden. Thus, as the court of appeals correctly concluded (Pet. App. 36; emphasis in original):

> [T]he rulings were not in conflict. One presiding judge at pretrial ruled on the burden of proof relating to a *particular count*, and thereafter the trial court judge ruled on the proof *necessary to convict under a specific statute*. * * * [The two rulings] do not give rise to any prejudice or reversible error. This is particularly true, when, as here, the instructions given, when considered in whole, were proper and adequate.

Petitioner's contention that the trial judge's ruling deprived him of the opportunity to prepare a defense is without merit. The government proved, in accordance with the pretrial ruling, each and every one of the allegations contained in the six subparagraphs of Count II. Petitioner knew that these were the allegations he must be prepared to meet at trial. (See Proceedings of Sept. 22, 1978, at 33-34.) The specificity of the allegations themselves and the full discovery given petitioner through the prosecutor's "open-file policy" (Proceedings of Sept. 22, 1978, at 18) fully apprised petitioner of the charges against him. No more was required. See *United States* v. *Buckner*, 610 F. 2d 570, 573-574 (9th Cir. 1979), cert. denied, No. 79-1014 (Apr. 14, 1980).

2. Petitioner contends (Pet. 11-12) that the trial judge erred in treating the issue of materiality under Count I of the indictment as a question of law. The court's instruction on materiality was as follows (Tr. 921):

> The question of materiality of the allegedly false statements made in connection with the subscribing of a tax return is a question of law for the Court. The Court instructs you that if you find that a substantial

> amount of gross receipts or other income was omitted from the tax return at issue herein, such omission is of a material matter as contemplated by Section 7206, Subsection 1, of Title 26 of the United States Code.

When a defendant is charged with violating 26 U.S.C. 7206(1), the test of materiality is whether particular items must be reported to permit correct estimation and computation of the tax due. *E.g., United States* v. *Null*, 415 F. 2d 1178, 1181 (4th Cir. 1969).[2] Here, the trial judge's instructions to the jury regarding materiality did no more than state the obvious and unavoidable conclusion that the omission of substantial amounts of revenue affects the computation of tax liability.[3] The

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[2]In contrast, "[t]he test for determining the materiality of [a] false statement [in a case in which the defendant is charged with having violated 18 U.S.C. 1001] is:

> "* * * whether the falsification is calculated to induce action or reliance by an agency of the United States, * * *, does it have a natural tendency to influence or is it capable of influencing agency decision?' "

United States v. *Valdez*, 594 F. 2d 725, 728 (9th Cir. 1979), quoting *United States* v. *East*, 416 F. 2d 351, 353 (9th Cir. 1969). In *Valdez* the court found that the trial judge's failure to submit the issue of materiality to the jury in a prosecution for conspiracy to make false statements in violation of 18 U.S.C. 1001 was harmless beyond a reasonable doubt because "[n]o reasonable jury could have reached any other conclusion." 594 F. 2d at 729. As in *Valdez*, the jury in this case could have reached only one conclusion as to the materiality of the omission of substantial amounts of revenue from Strand's tax return. Thus, the holding in *United States* v. *Valdez*, *supra*, relied upon by the petitioner (Pet. 12), does not conflict with the decision below.

[3]Petitioner asserts (Pet. 12) that the omission of gross receipts was immaterial because the government must show that petitioner actually had gross income from his sales of securities. It is well settled, however, that in a prosecution for filing a false income return under Section 7206(1), the government need not prove the existence

factual issue of whether petitioner had willfully omitted substantial amounts of gross receipts from his tax return was properly submitted to the jury (Pet. App. 26). See, *e.g., United States* v. *Haynes*, 573 F. 2d 236, 240-241 (5th Cir.), cert. denied, 439 U.S. 850 (1978); *United States* v. *Null, supra*, 415 F. 2d at 1181. On similar facts, the courts of appeals have uniformly approved instructions of the kind given here. See, *e.g., United States* v. *Taylor*, 574 F. 2d 232, 235 (5th Cir.), cert. denied, 439 U.S. 893 (1978); *United States* v. *Romanow*, 509 F. 2d 26, 28-29 (1st Cir. 1975).[4]

3. Petitioner contends (Pet. 15-19) that the prosecutor's reference during the trial to a deposition given by petitioner before the Securities and Exchange Commission warrants the granting of a new trial because the deposition should have been produced prior to trial under Rule 16(a)(1)(A), Fed. R. Crim. P. But petitioner has not shown that he was prejudiced by the government's inadvertent non-production of the document in question. Indeed, once the prosecutor became aware of defense counsel's failure to receive a copy of the previously recorded statements of the petitioner, he voluntarily

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of any taxable income and proof of omission of gross receipts of the kind which normally produce taxable income is sufficient. The crime is complete with the willful filing of a return that omits material items necessary to the computation of tax. *United States* v. *DiVarco*, 484 F. 2d 670, 673 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974); *United States* v. *Ballard*, 535 F. 2d 400, 404 (8th Cir.), cert. denied, 429 U.S. 918 (1976). See also *United States* v. *Taylor*, 574 F. 2d 232, 235-237 (5th Cir.), cert. denied, 439 U.S. 893 (1978).

[4]*United States* v. *Null, supra*, is not to the contrary. The court simply held that the question whether the omitted revenues were de minimis "was properly submitted to the jury." 415 F. 2d at 1181. Here, too, the court's instructions left to the jury the question whether the amounts involved were substantial.

assented to the sanction provided by Rule 16(d)(2), Fed. R. Crim. P., and made no further reference to the deposition at trial (Tr. 794-795). Moreover, there was evidence that both petitioner and his counsel were aware of the basic content of the deposition (Tr. 794; Proceedings of Sept. 22, 1978, at 12). In these circumstances, the trial court did not abuse its discretion in ruling that the prosecutor's actions were not prejudicial. *United States* v. *Kelly*, 569 F. 2d 928, 939 (5th Cir.), cert. denied, 439 U.S. 829 (1978); *United States* v. *Eisler*, 567 F. 2d 814, 816-817 (8th Cir. 1977). This factual determination was affirmed by the court of appeals (Pet. App. 26, 37) and does not merit further review. *United States* v. *Bowers*, 593 F. 2d 376, 379 (10th Cir.), cert. denied, 444 U.S. 852 (1979).

4. Finally, petitioner argues (Pet. 19-22) that he was deprived of a fair trial because the prosecutor in closing argument drew inferences unsupported by the record concerning the unreported gross receipts attributable to the nominee accounts. Petitioner failed to raise this point prior to the submission of the case to the jury and may not urge it now unless there was "plain error" that warrants reversal. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940); Rule 52(b), Fed. R. Crim. P. The record does not show that petitioner was prejudiced by the prosecutor's comments. *See Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974). Moreover, the testimony received at trial indicated that petitioner used the various nominee accounts to execute securities transactions for his benefit (Tr. 69, 94, 126, 454). Thus, the inferences drawn by the prosecutor in his closing argument were consistent with the testimony given at trial. The trial court did not abuse its discretion in ruling that petitioner was not prejudiced by this portion of the closing argument. *United States* v. *Nolan*, 551 F. 2d 266,

274 (10th Cir.), cert. denied, 434 U.S. 904 (1977); *United States* v. *Polack*, 442 F. 2d 446, 447 (3d Cir.), cert. denied, 403 U.S. 931 (1971).[5]

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[5]Petitioner also argues (Pet. 12-15) that the trial judge erred in not dismissing the securities fraud charge for pre-indictment delay. In order to establish such a claim petitioner must prove that the delay caused substantial prejudice to his rights to a fair trial and that the delay was an intentional device by the prosecutor to gain a tactical advantage. *United States* v. *Marion*, 404 U.S. 307, 324 (1971); *United States* v. *Lovasco*, 431 U.S. 783, 789-790 (1977).

In his motion filed in the district court, petitioner alleged that he was prejudiced by lost evidence and unavailable witnesses. At the September 22, 1978, hearing on his motion, he asserted that the information concerning the stock fraud counts was in possession of the Securities and Exchange Commission in 1974, and from this he reasoned (Proceedings of Sept. 22, 1978, at 31-32) that the prosecutor had intentionally delayed bringing the stock fraud charges so they could be joined with the income tax charge. Petitioner, however, failed to present any evidence at the pretrial hearing to support his allegations. Indeed, the prosecutor in this case advised the court that he had not been assigned the case until after June 1978, and that it was he who made the decision to join the stock fraud charges with the tax charges (Proceedings of Sept. 22, 1978, at 32). Thus, even if petitioner had established actual prejudice, he failed to meet his further burden of showing that the reasons for the delay were impermissible. *United States* v. *Lovasco, supra*, 431 U.S. at 788-796.

The evidence pertaining to the submission of a false tax return as charged in Count I was directly related to the evidence of fraud in the sale of securities as charged in Count II (Pet. App. 31). The fact that a complex case took several years for full investigation and development does not suggest that the government delayed to secure a tactical advantage. See *United States* v. *MacClain*, 501 F. 2d 1006, 1010 (10th Cir. 1974); see also *United States* v. *Matlock*, 558 F. 2d 1328, 1330 (8th Cir.), cert. denied, 434 U.S. 872 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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